

IN THE HIGH COURT OF NEW ZEALAND  
PALMERSTON NORTH REGISTRY

CP 34/94

BETWEEN MOUNTAIN ROCK PRODUCTIONS LTD  
First Plaintiff

AND P J CAMPBELL  
Second Plaintiff

AND P GEANGE  
Third Plaintiff

AND WELLINGTON NEWSPAPERS LTD  
Defendant

CP 29/94

BETWEEN MOUNTAIN ROCK PRODUCTIONS LTD  
First Plaintiff

AND P J CAMPBELL  
Second Plaintiff

AND P GEANGE  
Third Plaintiff

AND INDEPENDENT NEWS AUCKLAND LTD  
Defendant

Hearing: 24 June 1997

Counsel: J W Tizard for Defendants (Applicants)  
C J Walshaw for Plaintiffs (Respondents)

Decision: 26 June 1997

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RESERVED DECISION OF McGECHAN J

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Solicitors:

Oakley Moran, Wellington, for Applicants  
Wadham Goodman, Palmerston North, for Respondents

## **The Applications**

These are applications to review a decision of the Master delivered 21 August 1996 declining to strike out claims under s50 Defamation Act 1992, and granting leave to proceed under Rule 426A. The decision now is reported at (1996) 9 PRNZ 604. While a combined intitlement is used, and it is envisaged the proceedings will be heard concurrently, the two proceedings have not been consolidated, and a separate decision is required in each. I note that the First Plaintiff Mountain Rock Productions Limited is in liquidation. The proceedings in reality are continued by the Second and Third Plaintiffs alone.

## **The Proceedings**

Both claims allege defamation arising from newspaper publications concerning rock festival activity on the part of the First Plaintiff, and the Second and Third Plaintiffs as its directors. While different publications, dates, and newspapers are involved, it is envisaged both will be heard concurrently and, at least on the Plaintiffs' intentions, before a Judge alone. The Defamation Act 1992 and its revised procedures are applicable.

## **Background History**

For a sensible understanding of the issues, a comparative chronology is desirable. Dates given are dates of filing unless otherwise indicated.

	CP34/94 (WNL—"EVENING POST")	CP29/94 (INAL—"SUNDAY NEWS")
18.01.94	Publication	
29.04.94	Proceeding issues in District Court, NP 775/94, against INL	
24.05.94	Served	
07.07.94	Statement of Defence	

CP34/94 (WNL—"EVENING POST")	CP29/94 (INAL—"SUNDAY NEWS")		
29.08.94	Amended Statement of Defence		
07.09.94	Order substituting WNL as Defendant		
		11.09.94	Publication
06.10.94	Defendant's list of documents filed		
		07.10.94	Proceedings issue
11.11.94	Plaintiff applies to High Court for removal from District Court to High Court, and directions		
21.11.94	Order removing into High Court, directions application adjourned to 07.02.95		
		30.11.94	Statement of Defence
12.12.94	Removal order served on Defendant		
		13.12.94	Plaintiff's notice to discover
		14.12.94	Defendant's notice to discover
07.02.95	Directions application adjourned to 06.03.95		
		13.02.95	Defendant's list of documents
06.03.95	Directions application adjourned <i>sine die</i> 4 days notice		
01.05.95	Plaintiffs send praecipe to Defendant	01.05.95	Plaintiffs send praecipe to Defendant
		03.05.95	Plaintiffs' list of documents
		04.05.95	Defendant returns praecipe unsigned : outstanding matters
		05.05.95	Plaintiffs request copies of documents
		05.05.95	Plaintiffs send praecipe to Defendant
		08.05.95	Defendant returns praecipe unsigned : outstanding matters

CP34/94 (WNL—"EVENING POST")	CP29/94 (INAL—"SUNDAY NEWS")		
09.05.95	Defendant refuses to sign praecipe : outstanding matters		
19.07.96	Plaintiffs' counsel's memorandum dated 17.07.96 and letter to Registrar requesting chambers listing 08.08.96 filed and served	19.07.96	Plaintiffs' counsel's memorandum dated 17.07.96 and letter to Registrar requesting chambers listing 08.08.96 filed and served
06.08.96	Defendant's application to strike out under s50/alternatively security for costs filed		
07.08.96	Plaintiffs' application for leave 426A and directions filed	07.08.96	Defendant's application (dated 06.08.96) to strike out under s50/alternatively security for costs filed
		07.08.96	Plaintiffs' application for leave 426A and directions filed
08.08.96	Master hears applications s50 Rule 426A (security for costs adjourned to 19.09.96)	08.08.96	Master hears applications s50 Rule 426A (security for costs adjourned to 19.09.96)
21.08.96	Master's reserved decision delivered : strike out dismissed, leave 426A granted, directions deferred.	21.08.96	Master's reserved decision delivered : strike out dismissed, leave 426A granted, directions deferred.

(The sequence of filings in the INAL proceeding on 07.08.96 is not known).

In short, as can be seen, in both cases around early May 1995 Plaintiffs submitted praecipes for signature by Defendants, and Defendants declined to sign those praecipes on the basis there were still outstanding procedural matters. The proceedings then stood still for more than 12 months, next activity (to use a neutral word) being filing and service on 19 July 1996 of a memorandum dated 17 July 1996 by Plaintiffs' counsel which in substance sought directions proceedings be set down and resolution of outstanding procedural matters relating basically to amendments and discovery. By then, more than 12 months had elapsed since the (arguable) last "step" in the two proceedings, and leave was required under Rule 426A. The memorandum sought leave accordingly. Unless the 19 July 1996 memorandum in

itself constituted a “step” in the proceedings, both proceedings were at risk of striking out orders under s50 Defamation Act 1992. Applications were made to strike out. More formal application by Plaintiffs for leave under Rule 426A resulted.

#### *Master’s Decision*

The Master had the benefit of detailed argument, and reserved decision. After briefly reviewing aspects of the procedural history of both claims, and quoting the 19 July 1996 memorandum in full, the Master turned first to the application to strike out under s50. It was identified as the “main thrust” on the Defendants’ part. It was noted as common ground that “nothing happened” in the WNL proceedings after 9 May 1995, and in the INAL proceeding after 3 (sic) May 1995. The Master noted the absence of authority as to whether the filing of a memorandum could in itself be a “step” in proceedings within s50. The Master held that it could; and in consequence a “step” had been taken, through the filing of that memorandum well within the 12 month period prior to filing of applications to strike out. On that basis, s50 did not apply. Moreover, if that decision was erroneous, the Master regarded the case as one in which the s50 discretion was to be exercised in Plaintiffs’ favour. The Rule 426A application thus became relevant. The Master noted that delay did not much exceed the 12 month period. While unimpressed with explanations given for the delay, he gave weight to its brevity so assessed. The Master noted some difficulties with the pleadings, but accepted they could be overcome by appropriate amendments. He did not see prejudice accruing to the Defendants. The Master found a “proper issue” and exercised discretion to grant leave. He declined directions setting down pending amendments which were accepted as necessary.

#### **Submissions on Review**

On this review Defendants confined attack to the Master’s decision under s50. In light of subsequent authority in the Court of Appeal, notably *McEvoy v Dallison* (CA163/96, 15 April 1997), the challenge to leave under Rule 426A was not pursued. With respect, that was realistic.

The Defendants' primary submission was that the memorandum filed 19 July 1996 could not be treated as a "step" within s50, because prior leave was required under Rule 426A for that memorandum to be filed, but had not been obtained. A document could not be a "step" in a proceeding when the document was not authorised. As a secondary point, going beyond the absence of Rule 426A leave, its memorandum character did not suffice. A proper interlocutory application, filed and served as envisaged by the rules, was required for a "step" to be constituted. As to s50 discretion, counsel recognised the absence of specific statutory criteria. Drawing on the origins of the provision in the Report of the Committee on Defamation, December 1977 ("McKay report") paras 477-481, counsel submitted it was necessary to show "some adequate reason justifying that an exception should be made". *Walls v McBey* (1996) 9 PRNZ 610 was distinguished as involving settlement negotiations in train over a period bridging the critical date, with a judicial conference adjourned by consent to a date beyond the 12 month limit. The present case, by contrast, was put as involving unexplained delay, and without "compelling reason" for an exception. The claim was not "clear and obvious". Indeed, amendments recognised as necessary have not been made even yet.

Plaintiffs' submissions sought to uphold the Master's approach, put as supported by *Walls v McBey* (supra). The filing of a memorandum which sought directions pursuant to leave reserved and which advanced progress fell within the term "step". If the matter came down to discretion, the Master's approach to leave granted under Rule 426A had application to the (albeit different) discretionary question under s50. The Plaintiffs supported that approach by reference to the existence of a proper issue, and room for case management solutions.

I note both counsel were agreed that "step" bears the identical meaning in both s50 and Rule 426A.

### Section 50, Rule 426A, and Memoranda

I consider memoranda can, in appropriate instances, fall within the s50 and Rule 426A concepts of “step” “in a proceeding”.

I approach the matter first in principle.

There is no particular mystery in the concept of “step” “in a proceeding” given contexts. The section and rule envisage some genuine and authorised procedural act within the limits of the rules and recognised practice of the Court. Usually that will involve the filing of a document in the Registry: but even that is not essential. As Rule 432(2) implicitly recognises, a “step” may be wider than the filing of pleadings or the making of interlocutory applications. I have no doubt an oral interlocutory application under Rule 245 would constitute a “step”. While the act concerned more usually will be within the Registry or courtroom, actions outside Court premises governed by the rules of Court—e.g. the tender and return of praecipes under Rules 429 and 430—would qualify. The act must, however, be one within and governed by the rules or recognised practice of the Court. Actions outside that area, albeit connected with the litigation, are not “steps” for this purpose. Mere correspondence, or negotiations, or briefing of witnesses are not included. (Rule 432 hardly was intended to prevent preparation for trial after setting down). The act must also be bona fide in character, truly intended to advance resolution of the proceeding. Merely colourable acts, in reality merely devices attempting to avoid s50 or Rule 426A, do not constitute a “step”. Per contra, such constitute an abuse.

Within these concepts, memoranda have a place. It is true that memoranda have little if any direct recognition within the express language of the Rules; but use is widespread in practice, and well recognised. Memoranda are an accepted means for the formal conveyance by counsel of requests and information, existing comfortably alongside the formal regime of interlocutory applications. While in many instances a request, strictly speaking, should be enshrined in a formal interlocutory application, it will not necessarily be rejected if contained in a less formal

memorandum. At worst, Rule 5 will apply, with the procedural fault being an irregularity but not in itself resulting in nullity. In that light, I have no reason to believe the legislature for some unknown reason intended in 1992 to exclude from its concept of “step in a proceeding” the well recognised practice of procedure by memoranda.

While I reach these conclusions on the basis of principle, the outcome is consistent with other authority to date, such as it is. I suggest no particular weight should be given to *McKee-Fehl Constructors Ltd v Green & McCahill (Contractors) Ltd* (1988) 4 PRNZ 277 which relates to s5 Arbitration Act 1908, a rather different context. The preference expressed in that case for a “liberal” approach to a “step” is apposite in present context, but only coincidentally. Of more immediate interest are the decisions in *Saxpack Foods Ltd v J Wattie Foods Ltd* (1993) 6 PRNZ 120, clearly enough rejecting mere correspondence between parties as a “step”; *Winders v BNZ Ltd* (1994) 7 PRNZ 512 treating service of a notice for discovery (before filing) as a “step”; *Rea v Jordan Sandman Were Ltd* (1995) 8 PRNZ 264 (Tompkins J) treating filing of notices for discovery and lists of documents as “steps”, and approving *Winders* (supra); and *Walls v McBey* (1996) 9 PRNZ 610 (the only known authority under s50 itself) treating conferences called by the Court itself as “steps”. *Walls v McBey* (supra) does not give further assistance on present facts.

#### **Section 50 : “Step” : Decision**

Defendants submit that Plaintiffs’ memorandum of 17 July 1996 (filed 19 July 1996) nevertheless did not amount to a “step” in the proceeding, as in the absence of leave under Rule 426A the filing of the memorandum was not authorised. The Master, and I am bound to say the Plaintiffs’ submission, did not address this point. It has, at first sight, some attractions. “Step” means “authorised step”. As already noted, the legislature would not have intended a Plaintiff to gain advantage, and avoid s50, through an act contravening the Court’s rules and practice.

There is, however, a flaw. The memorandum filed on 19 July 1996 sought a number of directions, e.g. as to setting down and amendments, and to that extent was



unauthorised. To that extent, it was without the prior leave required under Rule 426A. However, the memorandum also sought leave under 426A. In its final paragraph it states in clear terms “leave is therefore sought pursuant to Rule 426A, subject to such directions as the Court thinks fit”. As must be implicit in Rule 426A, one does not need prior leave under Rule 426A to make application under Rule 426A, becoming caught in an infinite regression. There was, therefore, within the memorandum filed on 19 July 1996, an important element which was authorised despite absence of prior Rule 426A leave. An application of that sort under Rule 426A is as much a “step” in a proceeding as any other procedural act. Indeed, it is almost the ultimate attempt to make progress. It was a “step” which clearly was in effect as at 6 August 1996 when WNL filed its s50 application. Even if the Plaintiff’s formal 426A application filed (apparently) 7 August 1996 somehow overtook and extinguished the 19 July 1996 memorandum (a doubtful proposition), one or other of that memorandum or that formal application was in effect at the point on 7 August 1996 when INAL filed its counterpart s50 application. It is ironic, but the application under Rule 426A contained within the memorandum filed 19 July 1996 was an authorised “step” “in the proceeding” which *ipso facto* precludes any order by the Court under s50 striking out the proceeding.

While it might have been more satisfactory for the 426A application involved to have made by formal interlocutory application, rather than memorandum, I regard the memorandum filed as within permissible practice under principles just discussed. Some eye must be kept on practicalities, and also on policy requirements encapsulated in Rule 4. There already existed, in one (WNL) proceeding, a directions application standing adjourned *sine die*. It amounted to an appropriate vehicle for the further directions sought, and along with that, for Rule 426A leave which had become necessary. It was intended the two proceedings move together. It would have been pedantic to file another and separate interlocutory application, in the other proceeding, seeking the exact counterpart. The memorandum filed and served, and intended to operate within that standing interlocutory application, gave clear notice of orders sought and asserted grounds. No more was needed. I do not say a memorandum will always suffice for Rule 426A applications. Far from it. However, in the particular circumstances of this case, the memorandum fell within acceptable practice, and was a permissible Rule 426A vehicle.

**Section 50 : Discretion**

In case I err, and in any event as relevant to costs, I move on to the question of discretion. Clearly, indeed even more clearly than under Rule 426A, there is an onus upon a Plaintiff to satisfy the Court the proceeding should not be struck out. The burden involved should not be exaggerated. The section does not impose an express threshold requirement in the nature of "special circumstances" or the like. I agree that the report of the McKay Committee gives some assistance. Paragraph 479 states:

"479. We consider that where no step in the action has been taken by either party for 1 year, the defendant should ordinarily be entitled to have the action dismissed. Judges are generally reluctant to dismiss actions because of delay and we can see some advantage in fixing a period after which a plaintiff must show some adequate reason to justify an exception being made. A plaintiff who is really concerned at an injury to his reputation will not be dilatory."

With all respect, reference to "adequate" reason does not much advance matters. Testing by reversal, Judges hardly will grant leave if reasons are "inadequate". The term does, however, point to "adequate" reason rather than "compelling" reason as being the appropriate touchstone, and I prefer the former to the latter as between alternatives advanced by Plaintiffs in submissions.

One should also look more widely. This is a defamation provision, not a general provision. There has always been a problem in the defamation area with so-called "gagging" writs, hurriedly issued with a view to stifling discussion while an embarrassing point remains topical, then allowed to drift inactive for years to an ultimate abandonment. Traditional processes for striking out for want of prosecution have proved inadequate. The optimistic enactment of s45 is not likely to provide any better solution in practice, given problems of proof. I think it likely s50 was intended in large part to assist in sorting out proceedings genuinely pursued, albeit temporarily delayed, from those of a gagging character and those

where second thoughts have developed. In that light, s50 should be implemented in a manner which allows cases still genuinely pursued, applying any necessary case management disciplines to expedite, but disposes of cases which are or have become a mere facade.

I accept these present cases still are genuinely pursued. Progress down to tender by the Plaintiffs of praecipes in May 1995 was, by common standards, quite rapid. It is significant that the Plaintiffs submitted praecipes; and the Defendants demurred. This was not an all too common situation of a Plaintiff who, somehow, never quite gets around to setting his proceeding down. Delay from May 1995 to July 1996, approximately 14 months, is not excusable. The delay in 1995 is explained as due to other business commitments on the part of Second and Third Plaintiffs. Delay in 1996 is explained as due to other commitments of counsel. I do not accept any involvement required of the Plaintiffs personally in 1995 could have been of such a scale as to stall progress. Matters involved are largely lawyers' work, not lay clients'. Other professional commitments are not an excuse. I refer to the strong comments of Thomas J delivering the judgment of the Court in *NZ Kiwifruit Marketing Board v Waikato Valley Co-op Dairies Ltd* (CA 51/96, 28 April 1997). However, while the delay is not excusable, nor is it remarkably long. It was only some two months beyond the statutory twelve before the Plaintiffs again took an initiative. Significantly, as with the tender of praecipes, it was the Plaintiffs who ultimately revived proceedings with the memorandum and request to Registrar filed 19 July 1996. It was not the all too familiar situation of sudden action on the part of a Plaintiff bestirred by a Defendant's application to strike out or equivalent. I place no weight at all on the Second Plaintiff's affidavit of 8 November 1996 filed in opposition to the review, but the facts noted above speak objectively for themselves. There is no claim to prejudice arising from the delay which has occurred. Defendants, moreover, cannot point to the advantage of having given warnings of pending s50 or Rule 426A objections before time periods ran. Evidently, Defendants preferred to make no enquiry as to intentions; indeed perhaps to lie low. I am unimpressed by the inaction over necessary amendments to pleadings anticipated in the Master's decision since the latter was delivered, but it might have been thought such should be left until after this review—and confirmation or otherwise that the proceeding can continue—was decided, rather than incur potentially wasted further

expenditure on legal aid. As matters stand, and adopting to this extent a Rule 426A parallel, there seems no reason why this case cannot be managed onward to some just conclusion.

Insofar as the matter may reduce to one of discretion, I agree that discretion under s50 should be exercised against any order to strike out.

**Orders**

- (1) The application for review is dismissed.
- (2) Costs are reserved. For future reference, argument required some two hours. The Second and Third Plaintiffs are legally aided, contribution not known.

A handwritten signature in black ink, appearing to read 'R A McGechan J'. The signature is written in a cursive style with a large loop at the top.

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**R A McGechan J**